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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

QUENTIN T. WILES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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I. The Unanimity Question

As stated in the petition for writ of certiorari, the Tenth Circuit added to the considerable confusion among the lower federal courts regarding the nature of the unanimity requirement in federal prosecutions, by holding that multiple offenses — each defined by statute as a separate and distinct crime — could be joined in a single count without an instruction requiring the jury to reach unanimity as to any particular offense, so long as the offenses are alleged to be part of an on-going scheme. Respondent's brief in opposition only highlights this confusion and underscores the need for clarification by this Court: Respondent concedes that the

appropriate level of unanimity is determined by the statute itself, Opposition at 20, yet persists in the inconsistent and mistaken view that separate offenses may be joined in a single count under the rubric of a "scheme," *id.* at 23, and even offers the notion that a nonunanimous verdict may stand unless it offends "fundamental fairness." *Id.* at 20. In advancing these conflicting theories to sustain the verdict, Respondent effectively concedes the desirability of granting the petition in this case, in order to resolve the issue of the nature of the unanimity required to support a verdict of guilt under Rule 10b-5. The purpose of this reply, therefore, is simply to clarify a few matters that are incorrectly set forth, or relied upon, in Respondent's brief in opposition and to show that the writ in this case should be granted.

1. **Respondent's argument that a jury need not agree unanimously on the particular acts constituting a scheme to defraud has no application to this case.**

Respondent does not dispute that *each* materially false statement in connection with a purchase or sale of a security, whether or not part of a larger scheme, constitutes a separate offense under Rule 10b-5. *See Peil v. Speiser,* 806 F.2d 1154, 1162 (3d Cir. 1986). Respondent continues to assert, however, that a conviction under Rule 10b-5 may be sustained where allegations of multiple false statements are submitted to the jury without a requirement that they all agree as to at least one such statement, so long as the statements alleged to have been made in furtherance of a fraudulent scheme. Opposition at 22-23. Respondent errs by conflating two separate sections of Rule 10b-5. Respondent's view is undoubtedly correct when a defendant is charged in a single count solely with having violated Rule 10b-5 by engaging in such a scheme: so long as the jury is required to find unanimously that a defendant engaged in a scheme to defraud, the jury need not also unanimously agree on "preliminary factual issues" support-

ing that finding. *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991).

Mr. Wiles, however, was convicted under an indictment and jury instructions that did not require a unanimous finding of a fraudulent scheme. On the contrary, the indictment and the instructions alleged three "means or methods" of violating Rule 10b-5, only one of which was a scheme to defraud in one count. The jury was instructed to find Mr. Wiles guilty if they agreed that Mr. Wiles made a false statement to shareholders or engaged in insider trading, *regardless of whether they unanimously agreed that Mr. Wiles engaged in a scheme to defraud.* The false statements and insider trading alleged in this case were thus separate offenses in themselves, and alternative bases for a conviction, rather than mere predicate facts to an offense of engaging in a fraudulent scheme. Given that several distinct offenses were subsumed under the second and third "means or methods" — i.e., use of materially false or misleading statement in connection with a sale or purchase of a security, and of engaging in insider trading — of violating Rule 10b-5, instructing the jury to agree on one means or method was insufficient to ensure that they agreed on a particular offense. As a result, the jury should have been instructed to reach a unanimous verdict with respect to at least one such statement or one such trade by Wiles or a shareholder. Respondent's argument that the jury need not agree on the factual predicates for a scheme to defraud, therefore, is entirely beside the point.

2. The unanimity question was adequately preserved and is properly before this Court.

Respondent's contention, raised for the first time here, that Petitioner did not adequately preserve the unanimity objection is simply meritless. Petitioner moved to dismiss Count 2 of the indictment on grounds that it joined multiple

offenses in a single count and was duplicitous. Court of Appeals Appendix ("C.A.App.") 37-45. Petitioner specifically alluded to the danger of a nonunanimous verdict as a basis for the motion. *See* C.A.App. at 42; *see also*, *United v. Starks*, 515 F.2d 112, 116-17 (3d Cir. 1975), (danger of less than unanimous verdict is one of the "vice[s] of duplicity"), *aff'd*, 431 U.S. 651 (1977). Moreover, at the close of evidence, Petitioner renewed his objection to Count 2 and the district court's instructions on grounds that, given the multiple offenses charged in Count 2, the jurors would be confused and may vote to convict based on different offenses. C.A.App. 3297-98. The government, however, refused to make an election among the multiple offenses charged in Count 2. Having properly and repeatedly raised this objection, Petitioner did not forfeit his objections simply because the district court later reiterated a virtually identical "means or methods" instruction in response to a question from the jury. The unanimity question, therefore, was fairly presented to the district court in a timely manner. Fed. R. Crim. P. 30. That the issue was adequately preserved in the district court was not disputed by Respondent on appeal because it could not be reasonably disputed.

Respondent's assertion that the Court of Appeals "did not clearly address the unanimity claim" and did not contribute to a confusing split of authority among the circuits, Opposition at 19, n.9, is likewise without merit. Petitioner repeatedly argued before the Court of Appeals that the instructions failed to require the jury to reach unanimity as to the distinct offenses — including the multiple offenses of making false statements and the transactions allegedly constituting "insider trading" — joined in Count 2. Pet. C.A. Brief at 34-43; Pet. C.A. Reply Brief at 18-22; Pet. C.A. Petition for Rehearing at 5-8. Respondent also addressed this precise issue before the Court of Appeals. Resp. C.A. Brief at 41-44. After the parties fully briefed the issue, the Court of Appeals held squarely, albeit erroneously, that the

jury need not be instructed to agree unanimously on at least one among the multiple offenses alleged in Count 2, because the offenses were allegedly parts of a continuing scheme. This holding is clearly in conflict with decisions of other circuits holding that unanimity as to a particular act is required where each such act is defined by the relevant statute as a separate offense. *See e.g., United States v. Starks*, 515 F.2d 112, 117-18 n. 9 (5th Cir. 1991); *United States v. Edmonds*, 80 F.3d 810, 819 (3d Cir. 1996); *see* Petition for Writ of a Certiorari at 16-24. That the Tenth Circuit's holding, if uncorrected, will spawn further confusion in the lower federal courts is demonstrated by the inconsistent positions taken by Respondent who at times endorses the Court of Appeals' scheme-based approach, Opposition at 22-23, and at other times implicitly concedes that separate offenses as defined by statute require a unanimous verdict. Opposition at 20.

3. The jury's "findings" in other counts against Mr. Wiles do not encompass a unanimous finding sufficient to sustain the conviction under Count 2.

Respondent suggests that the now-vacated guilty verdict under the false statement count (Count 1) and the guilty verdict under the wire fraud count (Count 3) necessarily imply that the jury unanimously agreed as to at least one materially false statement among the many alleged to be contained in the five financial reports and a press release. Opposition at 24-25. This contention is without merit.

Contrary to Respondent's assertion, the jury did not find *any* statement in the 1987 10-K report to be materially false. In Count 1, the jury was erroneously told that the court will determine the materiality of the three allegedly false statements in that report, and consequently the jury made no finding of materiality. Likewise, the jury was not told to determine the materiality of the same statements in

Count 3. See *infra* II. Regardless of whether the latter error is "plain," the fact remains that there has been no *jury* determination that any of the statements were materially false. Accordingly, there is no unanimous jury finding which "effectively embraces" a finding that at least one of the statements alleged in Count 2 were materially false. *See Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in the judgment).

While the Respondent asserts that the Court of Appeals "determined" that the statements at issue were material, Opposition at 13, this assertion is irrelevant and wrong. On petition for rehearing, the Court of Appeals addressed the issue of materiality only for the purpose of determining whether the government presented sufficient evidence of materiality to support such a finding by a reasonable jury if the issue had been presented to them — so that a retrial on that count would not violate the prohibition on double jeopardy. The Court of Appeals merely held that the evidence "in the light most favorable to the government" was sufficient to support such a finding. An appellate court's "determination" of sufficiency cannot substitute for an actual finding by a jury beyond a reasonable doubt that at least one of the statements was materially false. *See California v. Roy*, 117 S.Ct. 337, 339 (1996) (Scalia J., concurring in the judgment) ("appellate speculation about a hypothetical jury's action, . . ." cannot replace "an actual jury finding of guilty") (*quoting Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993)). This Court has made clear that the requirement of a jury finding cannot be satisfied by appellate speculation, no matter how overwhelming the evidence. In fact, here the evidence on materiality was not overwhelming; it was hotly disputed by petitioner. *Sullivan*, 508 U.S. at 280. Accordingly, no other finding in this case obviates the need for a unanimous finding of guilt as to Count 2.

II. The Gaudin Question

Notwithstanding Respondent's assertion to the contrary, the jury was never instructed that they had to determine that the statements alleged to be fraudulent in Count 3 were materially false. The district court defined materiality for the jury in Count 1 and told them that the court would decide; it defined materiality in Count 2 and told the jury that they must decide; and it defined materiality in Count 3 without telling them who must decide the issue. Pet. App. D5-6. The district court compounded this error by pointing out to the jury that the same statements were at issue in Count 1 and Count 3. Pet. App. D7. This removal of the element of materiality from the jury's consideration constitutes error under *United States v. Gaudin*, 115 S.Ct. 2310 (1995).

In light of this Court's decision in *Johnson v. United States*, 117 S.Ct. 1544 (1997), this error may have to be evaluated under the plain-error standard of Federal Rules of Criminal Procedure 52(b). The error was "plain" at the time of appellate consideration, which occurred after this Court's decision in *Gaudin*. *See Johnson*, 117 S.Ct. at 1549. Although the Court did not reach the issue in Johnson, a failure to instruct the jury to determine an element of the crime affects "substantial rights," Fed. R. Crim. P. 52(b), because the Fifth Amendment entitles a defendant to a jury determination of every essential element of the crime charged. *Sullivan*, 508 U.S. at 277-78. Finally, unlike *Johnson*, where materiality of the perjured statements were "essentially uncontroverted," *id.* at 1550, the question of materiality was intensely disputed in this case: Mr. Wiles disputed the government's materiality showing prior to trial, at the close of the government's case, and again in his motion for judgment N.O.V. Failure to require a jury determination on this issue under these circumstances will seriously undermine the "fairness, integrity or public reputa-

tion of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993); *see Gaudin*, 115 S.Ct. at 2314-15 (determination of materiality involves "delicate assessments of the inferences a reasonable decision maker would draw from a given set of facts and the significance of those inferences to him" and is "peculiarly on[e] for the trier of fact") (internal quotations omitted).

Although Petitioner submits that the error constitutes reversible error under the *Johnson* standard, given that the Court of Appeals has not had an opportunity to evaluate this issue under the proper standard, Petitioner respectfully submits that this Court should grant the petition, vacate the conviction on Count 3, and remand to the Tenth Circuit for reconsideration in light of the plain-error analysis outlined in *Johnson*. While the Respondent suggests that the issue of materiality was settled by the Tenth Circuit, Opposition at 13, this claim is without merit. The Tenth Circuit merely held that "[c]onstruing the evidence in a light most favorable to the government" there was sufficient evidence to support a finding of materiality, such that a retrial on the false statement count would not violate the prohibition against double jeopardy. Pet. App. B-7. The court did not determine that a reasonable jury could not have found the statements immaterial, or that the fairness and integrity of criminal process would not be undermined if the matter is not submitted to the jury. Accordingly, Mr. Wiles' conviction under Count 3 should be vacated and the case remanded to the Tenth Circuit for determination of whether the failure to instruct the jury constitutes plain-error under *Johnson*.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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